Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,

Petitioner

vs.

LARRY G. HARDISON, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE, WORLDWIDE CHURCH OF GOD

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,
Petitioner,
vs.
LARRY G. HARDISON, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE WORLDWIDE CHURCH OF GOD, AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

INTEREST OF THE AMICUS CURIAE

The Amicus Curiae is a non-profit religious corporation, headquartered in Pasadena, California, of which the respondent, Mr. Larry G. Hardison is a baptized member.

The Worldwide Church of God teaches among its doctrines the observance of the seventh day Sabbath from Friday sunset to Saturday sunset, as well as the observance of seven annual holy days during the year.

The petitioner has challenged the constitutionality of the religious accommodation provision of Title VII of the Civil Rights Act of 1964. The decision of this court on said challenge is of direct interest to the members of the Worldwide Church of God scattered throughout the United States.

Amicus Curiae has secured the written consent of the parties to filing a brief in the case. Copies of said written consent have been filed with the Office of the Clerk.

ARGUMENT

I.

Facts Regarding The Worldwide Church of God

This amicus curiae will not extensively argue the law in this brief. This is being more than adequately dealt with in the briefs of the parties and the other amici. This amicus curiae instead wants to primarily focus in on certain practical facts for the court's consideration in applying the law to the case.

The Worldwide Church of God has historically observed the seventh day Sabbath and certain annual holy days during which its members refrain from secular labor. The Church presently has over 36,000 baptized member heads-of-households in the United States who will be affected directly or indirectly by the decision of this Court in this matter.

Like the Orthodox Jewish community, the Seventh-day Adventist adherents, and the members of many other minority religious organizations and beliefs, the members of the Worldwide Church of God have endeavored over the years to carve out a share of the American dream in a society that is basically geared to the major religions and to secularism. For these people, the decision of this court on the issues before it is not a matter of constitutionality or unconstitutionality of the accommodation provision of Title VII. Rather, it is a matter of bread and butter.

The Worldwide Church of God has always followed the policy, based upon biblical principles, of urging its members to strive diligently to be profitable and valuable employees for their employers. "Servants, obey in all things your masters according to the flesh; not with eyeservice, as men-pleasers; but in singleness of heart, fearing God: and whatsoever you do, do it heartily, as to the Lord, and not unto men." (Col. 3:22-23).

Based on the foregoing principles, the Church teaches its members that they should make every effort to accommodate to the needs of their employers, short of compromising with what they understand to be the commands of God. When, of course, the requirements of their employment conflict with the commands of God, then they are taught, "we ought to obey God rather than man." (Acts 5:29).

The Church does not teach total arbitrariness in refusal to work, in the face of a legitimate emergency. Rather, in accordance with the "ox-in-the-ditch" principle taught by Jesus, the Church teaches its members that an employee should be willing to work in the case of an emergency. (Luke 14:5).

Our experience in the vast majority of cases, has been that when a conflict arises between a member's job and an employer's requirements, the matter cn be worked out without any undue hardship on the employer. In fact, most employers have worked out a reasonable accommodation to the mutual satisfaction of everybody. However, if the requested accommodation is denied, for the vast majority of the members of the Worldwide Church of God, it is not a question of a choice between their religion or their job. They have already made that choice. It means, simply, that the member will be looking for other employment in order to maintain his and his family's livelihood.

Our experience has also been that, in many cases, the problem is only a one-time situation. That in such cases an employee may have worked for many years without any problem. That a problem arises on only one occasion and the employee is discharged. The accommodation requirement of the law is needed to prohibit such arbitrary dismissals.

The members of the Worldwide Church of God are also advised to work through and cooperate with their local union as much as possible to obtain accommodation. Unfortunately, in many cases, the unions have considered the members' religious accommodation requirements to be antagonistic to their union interests. In many cases, the unions have not only not been helpful, but have, in fact, been the source of discrimination and have pressured the employer to the same end.

This amicus curiae is not seeking a federal handout for its members. It is only seeking that its members be given a somewhat even chance with others in the employment market. In the earlier days of the nation, when the population was largely rural, agrarian, and composed of single-family businesses, there was perhaps less need for concern for the economic status of minority religious members since a farmer or single-family businessman was basically free to decide his own days and hours.

However, in our modern, complex industrialized society, where a large percentage of the work opportunities exist only in streamlined, assemblyline complexes, it becomes a compelling interest of the state to assure equal employment opportunity for all members of the society, regardless of their race, or religion, sex, color or national origin, where the same can be done without an undue hardship on the employer.

II.

The Religious Accommodation Provision Of Title VII Is Constitutional.

The Civil Rights Act of 1964, as amended, provides in Section 703(a) that:

"It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunitites or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Act was amended in 1972 to provide the following definition of religion:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." [42 U.S.C. § 2000e(j)].

The Supreme Court of the United States has discussed the meaning of the "Establishment of Religion" clause of the First Amendment on many occasions. In the case of **Everson v. Board of Education,** 330 U.S. 1, 91 L.Ed. 711, (1947), the court stated that:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' **Reynolds v. U.S.,** supra (98 U.S. at 164, 25 L.Ed. 249)."

In the case of **Walz v. Tax Commission,** 397 U.S. 664, 25 L.Ed. 2d 697, 701 (1970), the court said:

"It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity."

The court went on to state, however, that:

"The court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. For example, in **Zorach v. Clauson,** 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952), Mr. Justice Douglas, writing for the court, noted:

'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.' Id., at 312, 96 L.Ed. at 961.

'We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.' Id., at 313, 96 L.Ed. at 962.

• • •

"The course of Constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principal deductible from the First Amendment and all that has been said by the court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." **Walz v. Tax Commission,** 797 U.S. 664, 25 L.Ed. 697, 701-702 (1970).

This court has established a three-part test as to whether a statute offends the establishment clause. That is, (1) it must have a primarily secular purpose, (2) its primary effect must neither advance nor inhibit religion, and (3) it must not foster excessive government entanglement with religion. **Lemon v. Kurtzman,** 403 U.S. 602, 612-13, 29 L.Ed. 2d 745, 755 (1971).

Does the requirement of "reasonable accomodation" offend the "establishment of religion" prohibition as enunciated in the above-quoted cases? Based upon

Supreme Court decisions construing the "establishment of religion" clause, we believe that the definition of religion as embodied in the 1972 Amendments to the Civil Rights Act is clearly constitutional.

We would first point out that statutes are to be construed so as to avoid finding of unconstitutionality. **U.S. v. Harriss,** 347 U.S. 612, 619 (1954).

It should be noted that Congress, in outlawing discrimination on the basis of religion, did not single out religion as the sole basis for which discrimination was forbidden. It also included "race, color, sex, or national origin." The purpose of Congress was "to further promote equal employment opportunities for American workers." See **Legislative History of the Equal Employment Opportunities Act of 1972,** published by the U.S. Government Printing Office, page 1573.

As the Fifth Circuit has stated on a number of occasions, discrimination in employment opportunities is "one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses." **Rowe v. General Motors Corp.,** 457 F.2d 348, 354, (5 Cir. 1972); **Culpepper v. Reynolds Metals Co.,** 421 F.2d 888, 891 (5 Cir. 1970); **Huff v. N.D. Cass Co. of Alabama,** 485 F.2d 710, 713 (5 Cir. 1973).

The Supreme Court has held on many occasions that the First Amendment does not put religion totally outside the control of the government. For instance, in **Reynolds v. U.S.**, 98 U.S. 145 (1879), the court held that religious beliefs cannot be accepted as a justification of an overt act made criminal by the law of the land, and that legislation prohibiting bigamy is within the power of Congress.

In pursuing a "course of constitutional neutrality," the Supreme Court has found various laws to be constitutional and not "an establishment of religion" even though such laws may confer some benefits on certain religions and infringe to some degree upon the practice of others. **McGowan v. Maryland,** 366 U.S. 420 (1961); **Gallagher v. Crown Kosher Super Market,** 366 U.S. 617 (1961); **Two Guys from Harrison-Allentown v. McGinley,** 366 U.S. 582 (1961); **Braunfeld v. Brown,** 366 U.S. 599 (1961). The laws in these cases were found to have a **civil** or **non-religious** purpose for the benefit of society.

Even in the case of **Everson v. Board of Education,** 330 U.S. 1, 91 L.Ed. 711 (1947), already quoted from above, the Supreme Court, although speaking strongly against establishment of religion, held that providing public transportation to and from private and parochial schools, as well as to and from the public schools, did not infringe upon the establishment of religion clause.

In Zorach v. Clauson, 343 U.S. 306, 96 L.Ed. 954 (1952), the Supreme Court held that a program providing for "released time" for public school pupils to leave the school and go to their religious sanctuary, did not violate the establishment of religion clause of the First Amendment. In that case, the Court specifically held that ". . . separation of Church and state . . ." does not mean ". . . that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." 343 U.S. at 315.

In Tilton v. Richardson, 403 U.S. 692, 29 L.Ed.2d 790, and again in **Roemer v. Board of Public Works of Maryland** ....U.S. ...., 49 L.Ed.2d 179, 44 L.W. 4909 (1976), the Supreme Court held that an act which provided financial assistance to church related institutions for legitimate secular objectives of assisting and providing necessary facilities for higher education, did not violate the establishment clause, although some benefits accrued to such institutions.

Perhaps the most analogous statutory provision to that under consideration here is that of the Military Selective Service Act providing for exemption of those who "by reason of religious training and belief" are "conscientiously opposed to participation in war in any form." 50 U.S. C.A., Appendix, Section 456(j). The authority for said exemption comes only from acts of Congress. **U.S. v. MacIntosh,** 283 U.S. 605, 624 (1931).

Yet, the Supreme Court on several occasions, has upheld the constitutionality of said exemption against the contention that it was a law "respecting an establishment of religion." Selective Draft Law Cases, 245 U.S. 366, 389-390; **U.S. v. Seeter,** 380 U.S. 163, 188 (Douglas concurring) (1965); **Gillette v. U.S.,** 401 U.S. 437; **George v. U.S.,** 196 F.2d 445, 449 (9 Cir. 1952).

The government is to be **neutral** toward religion, not its adversary. **Everson v. Board of Education,** 330 U.S. 1, 91 L.Ed. 711, 724 (1947). The definition of religion as embodied in the 1972 Amendments to the Civil Rights Act is within the "play in the joints" language of Everson, supra.

Actually, rather than establishing religion, the 1972 Amendment to the Civil Rights Act, defining religion, has the desired effect of extending the free exercise clause of the First Amendment to the area of employment practices, insofar as such free exercise does not impose an undue hardship on the employer. This is in fact what Congress intended.

Senator Jennings Randolph of West Virginia, in comments before the United States Senate regarding the above-mentioned amendment, stated:

"The term 'religion' as used in the Civil Rights Act of 1964, encompasses, as I understand it, the same concepts as are included in the First Amendment — not merely belief, but also conduct; the freedom to believe, and also the freedom to act.

"I think that in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in federal, state, or local governments.

• • •

"I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back as it were to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days." (**Legislative History of the Equal Employment Opportunity Act of 1972,** page 713.)

There is no prohibition in the First Amendment prohibiting Congress from extending the free exercise of religion to those areas of commerce which are under Congressional power to regulate. Senator Harrison A. Williams, Jr. of New Jersey, Chairman of the Senate Committee on Labor and Public Welfare, and chief sponsor of the Senate bill amending the Civil Rights Act, stated:

"As I read the First Amendment of the Constitution, there is no problem here presented by the amendment in connection with the first clause:

'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.'

"In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard." (**Legislative History of the Equal Employment Opportunity Act of 1972,** page 715.)

In fact, if Congress, while affirmatively prohibiting discrimination on the basis of race, color, sex, or national origin, failed to prohibit discrimination on the basis of religion, this might be a violation of the equal protection of the laws clause of the Fifth Amendment. **Steele v. L. & N.R. Co.,** 323 U.S. 192, 208-209 (1944); **Bolling v. Sharpe,** 347 U.S. 497, 500 (1954).

Thus, it can be clearly seen that the statute here in question meets the requirement of "constitutional neutrality" mandated by the Supreme Court in **Walz. v. Tax Commission,** supra, and **Everson v. Board of Education,** supra.

The statute does not "set up a church." It does not "aid one religion, aid all religions, or prefer one religion over another" in the constitutional sense. It does not "force or influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion." It does not punish anyone "for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

Neither does the statute levy any "tax in any amount, large or small . . . to support any religious activities or institutions, whatsoever they may be called or whatever form they may adopt to teach or practice religion." Nor does it cause the federal government to "openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." **Everson v. Board of Education,** 301 U.S. 1, 15 (1947).

III.

Petitioner's Arguments

The brief of the petitioner in this case continually refers to the requirement of accommodation to religious observances and practices as "preferential treatment" of religion. Accommodation according to law is not "preferential treatment" of religion. It is merely the effort of Congress to comply with this court's holding in the case of **Griggs v. Duke Power Co.** 401 U.S. 424 (1971), where the court proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." (401 U.S. at 431).

Further, the "religious accommodation" provision helps not only those whose "practice" or "observance" is religious, but also requires accommodation when an employee's "practice" or "observance" is based on sincere **atheistic** beliefs. **Young v. Southwestern Savings and Loan Association,** 509 F.2d 140, 142 (1975). It does not, therefore, assist only religion as opposed to non-religion.

The petitioner in its brief attacks only the "religious accommodation — undue hardship" clause of Title VII. (Pet. Br., p. 23). They do not appear to take issue with the provision prohibiting discrimination "because of such individuals . . . religion . . . ." 42 USC, §§ 2000e-2(a) (1) and (2). Their only contention, therefore, seems to be with the wisdom of Congress in determining the **definition** of religion and not merely whether religious discrimination in employment, per se, may be prohibited.

The petitioner argues in their brief that TWA operates on a continuous basis, 24 hours per day, 7 days per week and 365 days each year (Pet. Br., p 36). This may be the case, but nobody works that schedule. Nor does it determine whether or not an employee's religious needs may be reasonably accommodated.

The petitioner argues in their brief that they have thousands of employees with diverse religious practices and that this must indicate that an employer cannot be required to accommodate individual religious preferences. (Pet. Br., page 36). There is no evidence that any of the other thousands of employees sought any religious accommodation, or that, if they did, TWA had any problem whatsoever, accommodating the same. TWA is represented by astute counsel. Obviously, if any such evidence existed, it would be in evidence and argued.

It is a well-known fact that employers constantly, routinely accommodate virtually all their employees from time to time in one way or another by providing for such matters as sickness, jury duty, vacations, funerals, and for numerous other personal matters. See **Claybaugh v. Pacific Northwest Bell Telephone Company,** 355 F.Supp 1, 5 (1973) where the employer had accommodated such things as toastmaster meetings, boy scout meetings, bowling teams, attendance by employees at Oregon State University, etc. TWA has not denied that they routinely provide for the same and similar accommodations. Or is

it merely that providing the other accommodations is not too much of an administrative burden whereas providing an accommodation for an employee based on a religious need is too much?

Is the petitioner's real objection that the statute offends the constitution? Or is petitioner's real objection that the employer has become so large and insensitive to individual employee's needs that it simply does not want to be bothered with having to treat the employees as individuals, but only as numbers and statistics in its labor force.

Sabbath keepers and other minority religious groups have historically been persecuted and discriminated against. If the "religious accommodation" provision of the law is not upheld, will signs begin to appear in employers' windows, "No Sabbath keepers need apply"? Will not Sabbath keepers find it increasingly difficult to find and hold employment? Will not employers be able to discriminate against such persons at their whim? If this comes to pass, Sabbath keepers may well become sojourners and fugitives because of their adherence to their religion.

CONCLUSION

The question here is one of reasonableness. The statute provides for "reasonable" accommodation of religious observance and practice. The petitioner raises numerous arguments in their brief which seem to question the "reasonableness" of the "reasonable accommodation" provision. But the statute itself answers that objection. Congress decided, and legislated, that a reasonable accommodation is one that the employer can make without placing an "undue hardship" upon the business of the employer. What could be more reasonable.

Congress has the right to reasonably regulate commerce. This amicus curiae asks the court to find that this is such a regulation. Therefore, the amicus curiae respectfully urges that the statute is constitutional and the holding of the Eighth Circuit below should be affirmed.

Respectfully submitted,
RADER, HELGE & GERSON

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PROOF OF SERVICE

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I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On February 11, 1977, I served the within AMICUS CURIAE BRIEF FOR WORLDWIDE CHURCH OF GOD on the interested parties in said action, by placing a true copy in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Ana, California, addressed as follows:

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I CERTIFY under penalty of perjury that the foregoing is true and correct.
EXECUTED on February 11, 1977, at Santa Ana, California.

JACK GALLAGHER